



In the Matter of

**Adjustment of the Rates for
Noncommercial Educational
Broadcasting Compulsory License**

Docket No. 96-6 CARP NCBRA

ORDER

The Library has before it nine motions related to testimony presented in the above-captioned proceeding. A description of the motions is as follows:

LIBRARY
OF
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1. A motion of the American Society of Authors, Composers and Publishers ("ASCAP") to strike certain portions of the written direct cases of Broadcast Music, Inc. ("BMI") and the Public Broadcasters¹;
2. A motion of ASCAP to amend the testimony of its witness, David Bander, to include recently available information;
3. An objection of ASCAP to the Public Broadcasters' written direct case request for a bifurcated proceeding;²
4. ASCAP's motion to strike certain portions of the Public Broadcasters' written direct case related to the collective fee stated;³
5. A motion of the Public Broadcasters to strike ASCAP's introductory statement to its written direct case;
6. A motion of the Public Broadcasters to strike the testimony of Jon Baumgarten, an ASCAP witness;
7. A motion of the Public Broadcasters to strike the testimony of Horace Anderson, an ASCAP witness, and ASCAP's exhibits 310, 311, 700, 701 and 721;

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¹ The Public Broadcasters include the Public Broadcasting Service ("PBS"), National Public Radio ("NPR"), and the Corporation for Public Broadcasting ("CPB").

² ASCAP's objection addresses the same issue as Public Broadcasters' motion for a bifurcated proceeding. The objection and motion are, therefore, resolved together at the end of this Order.

³ This motion is also related to Public Broadcasters' motion to bifurcate, and is addressed at the end of this Order.

8. A motion of the Public Broadcasters to strike certain ASCAP exhibits sponsored by Carol Grajeda; and
9. A motion of the Public Broadcasters to bifurcate this rate adjustment proceeding into two phases.

Oppositions and replies to these motions have been filed.

ASCAP's Motions to Amend and Strike Testimony

1. Motion to Amend.

ASCAP requests leave to amend exhibit 31 of its written direct case, which is part of the testimony of its witness David Bander. ASCAP seeks to include the number of radio stations, other than public broadcasting stations, licensed by ASCAP at the end of 1996. ASCAP submits that it did not possess such information at the time of submission of its written direct case, and that allowing the amendment would not cause undue hardship or delay in the proceeding. Public Broadcasters interpose no objection.

RULING: ASCAP's motion is granted.

2. Motion to Strike.

ASCAP moves, under 37 C.F.R. 251.45(c)(2), to strike what it alleges are two defects in the written direct cases of BMI and Public Broadcasters. With respect to Public Broadcasters, ASCAP objects to certain statements of Adam B. Jaffe regarding program budgets of public television and radio stations and music use on those stations, asserting that the statements are not grounded upon documentary evidence disclosed by Public Broadcasters. Public Broadcasters respond by stating that Dr. Jaffe's statements regarding program budgets do rely upon documentary evidence, and that the testimony

of Peter Jablow provides adequate evidence as to the incidence of music use by public radio stations. With respect to BMI, ASCAP objects to the testimony of Bruce Owen and Fredric Willms regarding public radio's use of BMI music because BMI does not possess music use data for public radio. Both Mr. Owens and Mr. Willms use commercial radio information to opine usage on public stations. BMI opposes ASCAP's motion, asserting the Messrs. Owens and Willms' testimony is relevant and both witnesses are available for cross-examination.

RULING: ASCAP's motion to strike is denied. Determinations as to the weight, sufficiency, and admissibility of evidence are properly made by the CARP. ASCAP is free to test the statements of Messrs. Jaffe, Owens and Willms on cross-examination and to raise the same objections contained in its motion to strike with the CARP.

Public Broadcasters' Motions to Strike

1. Motion to Strike ASCAP's Introductory Statement.

Public Broadcasters move to strike pages 3-9 of ASCAP's introductory statement in its written direct case on the grounds that such statement constitutes a legal brief not permitted by the rules as this juncture and, in the alternative, is not sponsored by a witness. Public Broadcasters ask that if the Library does not strike these pages, that it be permitted to amend its introductory statement to address ASCAP's contentions. ASCAP objects to Public Broadcasters' motion, submitting that introductory statements are common practice in CARP proceedings, and that Public Broadcasters themselves have included a similar introductory statement in their written direct case. ASCAP also submits that its introductory statement does not require a sponsoring witness because it

does not constitute evidence in the proceeding. ASCAP objects to allowing Public Broadcasters an opportunity to amend their introductory statement to rebut the contentions made in ASCAP's statement, on the grounds that such an opportunity would constitute a "second bite at the apple" for Public Broadcasters.

RULING: Public Broadcasters' motion is denied. Introductions to the written direct cases are useful tools to the arbitrators, assisting them in determining the contents of the cases and providing a general description of the presentation of the evidence. While an introduction provides a roadmap for a written direct case, it does not constitute evidence in the proceeding. All evidence presented must have a sponsoring witness, as required by section 251.43(e) of the rules. Likewise, introductions are not legal argument. Legal argument on the written direct cases is reserved for later portions of the proceeding and should not be included in the introduction. Parties to this proceeding and future proceedings are advised that introductions should be nothing more than descriptions of the contents of the written direct case, and may include brief summaries of the testimony. While ASCAP's introduction pushes the boundaries of this limitation, it does not cross it.

Public Broadcasters' request to amend their introduction is also denied. Because introductions constitute neither evidence nor legal argument, there is no point in permitting Public Broadcasters to amend their introduction to refute statements made in ASCAP's introduction.

2. Motion to Strike Testimony of Jon Baumgarten.

Public Broadcasters move to strike the testimony of ASCAP witness Jon Baumgarten on the grounds that his testimony is in violation of the District of Columbia Rules of Professional Conduct ("DC Rules") governing conflicts of interest. Public Broadcasters assert that Mr. Baumgarten's law firm, Proskauer Rose, L.L.P., represents NPR in other matters, and that Mr. Baumgarten did not obtain permission from NPR,

as required by the DC Rules, to appear as a witness in this proceeding on behalf of ASCAP.

ASCAP opposes the motion, asserting among other things that the DC Rules are not applicable to this situation because Mr. Baumgarten is not representing ASCAP as an attorney, but is appearing only as an expert witness, and that Mr. Baumgarten's continuation as an expert witness does not taint the integrity of this proceeding.

RULING: The issue is designated to the CARP for resolution: to wit, whether the testimony of Jon Baumgarten involves a conflict of interest that requires it be stricken from the record in this proceeding.

3. Motion to Strike Testimony of Horace Anderson and Exhibits 721, 310, 311, 700 and 701, and Certain Exhibits Sponsored by Carol Grajeda.

Public Broadcasters move to strike the testimony of Horace Anderson, the sponsoring witness of Exhibits 721, 310, 311, 700 and 701, along with the exhibits themselves. Exhibit 721 is a chart listing salary structures of employees for public radio and television stations, taken from two CPB documents (Exhibits 310 and 311), and compares them to salaries of commercial television and radio station employees taken from two National Association of Broadcasters' documents (Exhibit 700 and 701). Public Broadcasters claim that the analogy between public and commercial broadcast station employees is not appropriate because it is based upon unsubstantiated assumptions, and because Mr. Anderson is not competent to sponsor such testimony. ASCAP opposes the motion.

Public Broadcasters also move to strike over 100 exhibits sponsored by Carol Grajeda on the grounds that she is not a competent witness. These exhibits are a collection of reports, articles, pamphlets and lists related to public television and radio. Public Broadcasters also object to certain exhibits on the grounds that they constitute hearsay. ASCAP opposes the motion.

RULING: Public Broadcasters' motion to strike the testimony of Horace Anderson and Exhibits 721, 310, 311, 700 and 701, and motion to strike certain exhibits sponsored by Carol Grajeda, are denied. Determinations as to the weight, sufficiency, and admissibility of evidence are properly made by the CARP. Public Broadcasters are free to make these same objections to the CARP, as well as challenge ASCAP's testimony on cross-examination.

Bifurcation of This Proceeding

The Library has received three pleadings with respect to bifurcation of this proceeding. Public Broadcasters stated in their written direct case that this proceeding should be bifurcated into two phases, prompting ASCAP to file an objection to this request. The objection also includes a motion to strike certain exhibits related to the request for bifurcation. On the same day these pleadings were filed, Public Broadcasters filed a motion to bifurcate. Because all these pleadings relate to the same issue, they are addressed together in this ruling.

Public Broadcasters request that the Library bifurcate this proceeding into two phases: a "Phase I" proceeding that would determine the overall royalty obligation of Public Broadcasters under the section 118 license, and a "Phase II" proceeding that would determine the division of royalties between ASCAP and BMI. Public Broadcasters

urge that a bifurcation is needed because BMI and ASCAP have submitted different methodologies for determining the value of their music, and Public Broadcasters are only concerned with their overall royalty obligation for all music and need not participate in the proceeding as the CARP determines the relative values of ASCAP's and BMI's music. Public Broadcasters cite the two phase process of distribution proceedings under the cable compulsory license as grounds for adopting a similar approach in this proceeding. Public Broadcasters' written direct case contains a collective fee for ASCAP and BMI music; i.e. the total amount of royalties Public Broadcasters believe they should pay each year for use of all ASCAP and BMI music.

ASCAP opposes Public Broadcasters' request on the grounds that bifurcation is not permitted under the legislation, regulations and rules applicable to this proceeding. ASCAP also asserts that bifurcation of the proceeding would be highly prejudicial to its case. In addition, ASCAP moves to strike Public Broadcasters' proposed collective fee for failure to comply with section 251.43(d) of the rules, and to strike references to the 1992 voluntary license negotiated between ASCAP and Public Broadcasters (which involved a collective fee) contained in Public Broadcasters' written direct case.

BMI opposes Public Broadcasters' request on the grounds that it is not legally permissible, would result in considerable duplication of work and administrative inefficiency, and would be prejudicial to BMI.

RULING: Public Broadcasters motion to bifurcate this proceeding is denied. While division of this proceeding into two phases may save Public Broadcasters certain expenses, the Library is not persuaded that bifurcation will best serve the interests of the CARP or promote administrative efficiency.

ASCAP/BMI and the Public Broadcasters have proposed different methodologies for calculating the section 118 royalty obligation. ASCAP and BMI focus on use of their respective members' copyrighted works, while Public Broadcasters focus only on their total royalty obligation (i.e. a collective fee). It is within the CARP's discretion to determine whether the proposed methodologies, or another of the CARP's own determination, is the best means of fulfilling the statutory obligation of setting rates and terms for the section 118 license. Granting Public Broadcasters' motion eliminates the CARP's discretion by requiring the CARP to accept Public Broadcasters methodology. The Library believes that the CARP should be allowed to examine the various proposals concurrently in a single proceeding.

The Library is also concerned that granting Public Broadcasters' motion will lead to increased expense and delay. Had the parties agreed to bifurcation prior to the filing of written direct cases, then division into two phases might have been the most efficient means of handling this proceeding. However, ordering bifurcation at this stage would require allowing the parties to amend their written direct cases and conduct additional discovery. This could not be accomplished by the December 31 convocation date of the CARP. In sum, it would be neither proper nor prudent to order bifurcation of this proceeding.

ASCAP's motion to strike Public Broadcasters' collective fee, and the testimony concerning the 1992 license agreement between ASCAP and Public Broadcasters as it relates to calculation of the collective fee, is denied. Section 251.43(d) of the rules requires that each party, in a rate adjustment proceeding, "state its requested rate." The rule does not require each party to state a requested rate with respect to each of the other parties represented in the proceeding. The Library interprets the term "rate" broadly enough to include Public Broadcasters' collective fee proposal. As noted above, it is up to the CARP to determine which methodology is most appropriate for determining Public Broadcasters royalty obligation under section 118 of the Copyright Act.

SO ORDERED.

Marybeth Peters
Register of Copyrights

BY:


William J. Roberts, Jr.
Senior Attorney

DATED: December 9, 1997